

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton)
Power and Light Company to Update its Economic) Case No. 18-0374-EL-RDR
Development Rider.)

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

This case involves charges that Dayton Power and Light Company (“DP&L”) seeks to collect from customers through its Economic Development Rider (“EDR”). Under the EDR, DP&L seeks to collect, from customers, the costs associated with incentives given to signatory or non-opposing parties of its latest electric security plan (“ESP”).¹ The incentives offer large customers a discounted rate based on their usage. The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor in this case, files these Comments on behalf of DP&L’s residential customers.

On June 24, 2009, the Public Utilities Commission of Ohio (“PUCO”) approved DP&L’s request to implement the EDR.² The EDR was initially set at zero dollars (\$0.00) as a placeholder rider,³ meaning that no party, including the PUCO, could fully

¹ *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, *et al.*, Opinion and Order (Oct. 20, 2017) at pp 8-9.

² *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, *et al.*, Opinion and Order (June 24, 2009).

³ *Id.*

understand the impact of the EDR on customers. On October 26, 2011, the PUCO approved DP&L's request to modify its accounting procedures associated with the EDR.⁴ In addition, the PUCO authorized DP&L to defer costs associated with implementing any reasonable arrangement for later collection from customers. On October 20, 2017, the PUCO approved DP&L's current EDR.⁵

On March 15, 2018, DP&L filed its application for semi-annual reconciliation as required by O.A.C. 4903:1-38-08(A)(5). In the application, DP&L offers proposed language to make the EDR subject to refund. But, the proposed language fails to adequately protect customers. Accordingly, the PUCO should not approve DP&L's EDR tariff without, at minimum, incorporating the following OCC recommended language to protect customers.

II. RECOMMENDATION

A. **The EDR should include refund language to enable the PUCO to get customers' money back to them for charges later found to be imprudent, unreasonable, or unlawful.**

DP&L's proposed language offers to make the EDR rider subject to refund based upon audits by the PUCO. This language is narrow and limits the actual protection afforded customers. It fails to address the far reaching and negative ramifications for customers of a recent Supreme Court of Ohio ("Court") holding concerning FirstEnergy's alternative energy rider.⁶

⁴ *In re the Application of Dayton Power and Light Company to Modify its Accounting Procedures for Purposes of Deferring Costs Associated with Reasonable Arrangements*. Case No. 11-3399-EL-AAM, *et al.*, Opinion and Order (October 26, 2011).

⁵ Case No. 16-395-EL-SSO, at pp. 8-9.

⁶ *In re Rev. of Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, Slip Op. 2018-Ohio-229 ("FirstEnergy").

The *FirstEnergy* case involved a rider that was updated quarterly and approved automatically unless the PUCO acted otherwise within 30 days.⁷ The rider was subject to true-up, based on an annual prudency audit. After one such audit, the PUCO ordered FirstEnergy to return more than \$43 million in imprudently incurred charges to customers.⁸

On FirstEnergy's appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.⁹ The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.¹⁰ Thus, even though the order approving FirstEnergy's alternative energy rider stated that it could only collect prudently incurred costs, the Court held that the PUCO's order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.¹¹ FirstEnergy was allowed to keep more than \$43 million in imprudently incurred costs it had collected from customers.

Unless the PUCO takes action to conform the tariff language in these riders to the Court's decision, any subsequently-conducted review of riders could be rendered meaningless. Customers could be overcharged without any way to be reimbursed. This circumstance can result in an unfair windfall¹² for utilities who already are benefiting (to the detriment of consumers) from an exception to traditional regulation that allows

⁷ *Id.* at ¶ 18.

⁸ *Id.* at ¶ 10.

⁹ *Id.* at ¶ 10.

¹⁰ *Id.* at ¶ 18.

¹¹ *Id.* at 8, 19.

¹² *Id.* ¶ 18.

single-issue ratemaking for electric distribution utilities (Chapter 4928, alternative ratemaking.)¹³

The language proposed by DP&L fails to adequately protect customers from the harmful impact of the *FirstEnergy* decision. It is not clear (based on DP&L’s proposed language) if the EDR is subject to refund only if there is a prudence review through an audit. This lack of clarity leaves uncertainty as to what would happen, outside the context of an audit proceeding, if the PUCO determined that the charges were unlawful, imprudent, and/or unreasonable. There would also be uncertainty as to what would happen if the Supreme Court of Ohio determined that the charges were unlawful, imprudent, and/or unreasonable.

The PUCO must guarantee customers are protected from unjust or unreasonable rates.¹⁴ Thus, OCC recommends that the PUCO add the following language to the EDR: **“Any charges collected from customers under this tariff that are later determined unlawful, unreasonable, or imprudent by the PUCO or Ohio Supreme Court is refundable to customers.”** This language should be permanently placed in the EDR tariff. This modification would make clear that any charges paid by consumers later found to be unlawful, imprudent, or unreasonable (by the Court or the PUCO), for any reason, may be refunded to them.

III. CONCLUSION

DP&L filed proposed tariff language that fails to protect customers from the negative ramifications of the Court’s *FirstEnergy* decision. DP&L’s proposed language is

¹³ See R.C. Chapter 4927.

¹⁴ See R.C. 4905.22; R.C. 4905.26.

ambiguous. The language, at best, only guarantees refunds associated with a prudence review. But, even this language is unclear. The PUCO should remove any ambiguity that remains so that customers are protected from paying for charges that are found to be unjust, unreasonable, or imprudent by the PUCO and the Court. Thus, the PUCO should incorporate OCC's recommendations to guarantee customers are protected from paying more than is just and reasonable under Ohio law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Comments was served on the persons stated below *via* electronic transmission, this 4th day of April 2018.

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Summary: Comments Comments by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Woltz, Zachary E Mr.